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STATE STATUTES AND ADMIRALTY.

One of the most interesting and at the same time one of the most perplexing questions which the admiralty lawyer has to answer is in relation to State Statutes giving and attempting to give actions against vessels.

In many of the states bordering upon navigable waters statutes have been enacted providing for liens for the building, repairing and supplying of vessels. The statutes have generally been enacted without any regard for the exclusive jurisdiction of admiralty in certain cases growing out of actions against vessels, without any distinction being made between domestic and foreign vessels or without any thought but that state courts might enforce actions *in rem* against vessels in all instances. The confusion and litigation which have resulted from such statutes have in many instances made "confusion worse confounded" to those who are not familiar with maritime law. This confusion from these misleading statutes is not confined to laymen having dealings with vessels, but it is very troublesome to a state court practitioner when called upon to give any advice to a client in regard to these matters.

Since *The Lottawanna,* (2 Wall. 558), it has been a recognized province of the states to provide for a lien against a domestic vessel for supplies and repairs and provide for its enforcement in the admiralty courts, but to provide for liens against a foreign vessel or against all vessels is in direct conflict with the admiralty jurisdiction; for admiralty gives action *in rem* against a foreign vessel.

This question was only recently before the Supreme Court of the United States where the State of Washington attempted by statutes to create liens on ocean-going vessels for work done and

materials furnished on the order of a contractor and provided that a lien could be enforced any time within three years and also for the enforcement of this lien in admiralty. The Supreme Court held the act unconstitutional as an unlawful interference with the exclusive jurisdiction of the admiralty courts. In this case the vessel was owned in Illinois and was subject to a lien under the general maritime law which could have been enforced at any time and these statutes attempted to make the lien good for three years, while the general rule of admiralty recognizes no time for which a lien shall be good, but does require one to pursue his claim with reasonable diligence, and the reason for this must be obvious, for a vessel trading in different ports, supply and material men have a right to suppose she is worthy of credit and not subject to any state liens.

The Court in commenting on the question whether materials and labor furnished to a contractor constitute a lien upon a vessel said the following: "There is a general consensus of opinion in the state courts and in the inferior federal courts that labor and materials furnished to a contractor do not constitute a lien upon the vessel unless at least notice be given by the owner of such claim before the contractor has received the sum stipulated by his contract." (*The Roanoke,* 189 U. S. 185, 47 L. Ed. 770.)

It will be interesting to observe that these statutes also provide for the construction of a vessel and provide for an enforcement of the lien in admiralty. While this question was not before the Court, until *People's Ferry Company v. Beers,* (20 How. 393. 15 L. Ed. 961,) is overruled, which decides flatly that contracts for the construction of a vessel are not maritime, it must be apparent that these statutes, so far as they apply to the construction of a vessel, and enforcement of a lien for such construction in the admiralty, are void.

It has long been the contention of some of the text writers, notably Mr. Benedict and Mr. Hughes, (*Benedict on Admiralty,* Sec. 265 A. ; *Hughes on Admiralty,* p. 106), that there is no sound reason why a contract for building a vessel is not just as much maritime as a contract for repairing her. The contract for repairing a vessel has nothing to do with any particular voyage, which was one of the main contentions in the case of *People's Ferry Company v. Beers, supra.* It would seem that the only thing that can be said in support of the theory that the construction of a vessel is not maritime is, that it has never been in the water and is not licensed and registered.

The decision was rendered when the tendency of the Supreme Court was to curtail the admiralty jurisdiction, while at the present time the tendency seems to be in the opposite direction, and one might reason that in view of *The Blackheath,* (195 U. S. 361, 49 L. Ed. 236,) which has upset the practice of this country for more than forty years, that admiralty had no jurisdiction of an action that was consummated upon land, holding that in the case of a beacon light affixed to piles driven into the bottom of a river and being damaged by a vessel, an action for such damages was cognizable in admiralty. Mr. Justice Brown, in concurring in this opinion, said: "I accept this case as practically overruling the former ones, and as recognizing the principles adopted by the English admiralty court jurisdiction act of 1861 (sec. 7), extending the jurisdiction of the admiralty court to 'any claim for damages by any ship.' This has been held in many cases to include damage done to a structure affixed to the land. The distinction between the damage done to fixed and floating structures is a somewhat artificial one, and, in my view, founded upon no sound principle; and the fact that Congress, under the Constitution cannot extend our admiralty jurisdiction affords an argument for a broad interpretation commensurate with the needs of modern commerce. To attempt to draw the line of jurisdiction between different kinds of fixed structures as, for instance, between beacons and wharves, would lead to great confusion and much further litigation."

It might be reasonably argued from this that should a case now be brought before the Court for the construction of a vessel, admiralty might take jurisdiction of it.

Another interesting case is that of *Perry v. Haines,* (191, U. S. 18, 46 L. Ed. 73,) which was a case for repairs to a canal boat while she was engaged in navigating the Erie canal. In this case it was attempted to enforce a lien under a state statute in the state courts of New York. This statute provided that upon the written application to a justice of the Supreme Court of New York, a warrant would issue for the seizure of a vessel and an order to show cause why she should not be sold to satisfy the lien—the contention being in this case that the Erie canal was not within the admiralty jurisdiction but an inland canal of the state and therefore the state courts had exclusive jurisdiction. The Court held that the Erie canal was part of the great water ways of the country and it would be anomalous to say that a vessel was subject to the admiralty jurisdiction when in the Hudson river

but when passing through the canal was not subject to such jurisdiction but was subject to the admiralty jurisdiction again upon entering Lake Erie, and held that the State Statute, in attempting to provide for a process *in rem* to enforce the lien against a vessel in the state court, was in violation of the Constitution. If this statute has provided for the giving of a lien to a domestic vessel and then provided for its enforcement in admiralty it would come within the recognized principle established in *The Lottawanna, supra.*

The case of *The Glide,* (167 U. S. 606, 42 L. Ed. 296,) arose under a Massachusetts statute which gave a lien on all vessels for construction, repairs and supplies, when such supplies, construction or repairs were contracted for, either expressly or impliedly, with the agent or owners of the vessel. The "Glide" was a tug boat owned in the District of Massachusetts and had been repaired at the port of Boston. Suit was brought and upheld in the state court under this statute to enforce the lien for repairs. The case was taken by a writ of error to the Supreme Court of the United States where, in an order by Mr. Justice Gray, it was held that a state statute giving a lien and providing for its enforcement in a state court in the nature of a proceeding *in rem* was unlawful and in violation of the exclusive jurisdiction of admiralty as provided by the Constitution.

While the question was not before the Court as to whether this statute would be good so far as giving a lien is concerned, if one should enforce such lien in the admiralty courts, it would seem reasonable that such would be the interpretation, for it is within the province of states to provide for liens, but such liens must be enforced in admiralty. It would seem unreasonable to say that just because the state has provided for an unlawful means of carrying out the liens, that where a lien is given one may not use the lien and select a proper forum.

It will be noticed that this Massachusetts statute did not offend as some of them have, notably the State of Washington statute, in giving a lien, unqualified against foreign vessels, for it provided for a lien only when it was contracted for with the owners of the vessel or with their agents, and the theory of the admiralty law has always been that there is no lien, that is by implication, against a foreign vessel, if the owners are present even though she is in a foreign port, for the presumption is that the contract is upon the personal credit of such owner or agent and the vessel is not in need of assistance.

The Moses Taylor, (4 Wall. 411, 18 L. Ed. 207,) was a case brought under a California statute, which provided for a process *in rem* in the state court against any vessel for supplies and materials furnished for the use or repair and for breach of contract for transportation of persons or property. The "Taylor" was a vessel whose home port was New York and was employed in navigating the Pacific ocean and carrying passengers and freight between Panama and San Francisco. While employed in such trade, the owner of the steamer contracted to carry a passenger in the steerage from New York to San Francisco, and for the breach of this contract an action was brought under the state statute in San Francisco. Upon a writ of error from the United States States Court to the highest court of California it was held that inasmuch as the contract for carrying a passenger was to be performed upon the high seas and had to do with commerce and navigation, it was a maritime contract and should be enforced in the federal courts. Mr. Justice Field, who wrote the opinion, in commenting upon the saving clause of the 9th section of the judiciary act, said the following: "That clause only saves to suitors the right of a common law remedy, where the common law is competent to give it. It is not a remedy in the common law courts which is saved, but a common law remedy. A proceeding *in rem* as used in the admiralty court is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common law courts, it is given by statute."

It would seem that under this statute if the plaintiff had merely brought an action in the state court for a breach of contract and attached the steamer as the property of the defendant, assuming that some statute of California gave such right of action, that he would have had a right of action in a common law court, assuming of course, that the vessel was within the jurisdiction of California.

The Ad. Hine, (4 Wall. 555, 18 L. Ed. 451,) was a case brought under an Iowa statute providing for proceedings *in rem* in the state court in case of an injury to persons or property by vessel, officers or crew. The "Hine" had been in collision on the Mississippi River near St. Louis with steamer "Sunshine" and proceedings were brought against her in the state court under the statute. The owners of the "Hine" interposed a plea to the jurisdiction of the state court and the point was overruled, which decision overruling the plea was affirmed by the highest court in the state. The case before the Supreme Court of the United States upon a writ of error and it was held that inasmuch as the

state court of Iowa attempted to enforce a proceeding *in rem* against a vesel which is within the exclusive jurisdiction of admiralty, the statute was unconstitutional.

The suit for the collision, so far as the proceeding *in rem* was concerned, was clearly within the jurisdiction of the admiralty courts, even though such collision did occur within the waters of the State of Iowa and such statute attempting to give proceedings *in rem* was unconstitutional.

In this case if a tort action had been brought in the state court of Iowa attaching the vessel as the property of her owners, whoever they might be, and not taking any proceedings against the vessel, such action might be maintained in the saving clause of the judiciary act.

In *The Belfast,* (9 Wall. 643,) a statute of Alabama was up for interpretation which attempted to give a lien upon a vessel under a contract of affreightment. It was held unconstitutional in so far as it provided for the enforcement of a lien in the state court by proceedings *in rem* because the lien was a maritime lien, the state courts having no authority to hear and determine a suit *in rem* in admiralty to enforce maritime matters.

The State of Illinois passed some statutes attempting to give mortages against a vessel priority over claims for supplies. The Supreme Court of the United States in commenting upon this statute (*The Rumbell,* 148 U. S., 37 L. Ed. 345,) said: "Any priority given by a state statute or by decisions, at common law or in equity to a mortgage upon a vessel as against a claim for supplies and necessaries furnished to the vessel at her home port, is immaterial; and that the admiralty courts of the United States enforcing a lien because it is maritime in its nature, arising upon a maritime contract, must give it the rank to which it is entitled by the principles of admiralty and maritime law."

There is no question but that the states may provide for an action against the owners of a domestic vessel with the power of attachment. This would be analogous to an action *in personam* in admiralty with a foreign attachment. The distinction is that an action against the vessel itself is exclusively within the admiralty jurisdiction and cannot be infringed upon by any state laws.

It is true in the case of *Edwards v. Elliott,* (21 Wall. 502,) a state statute of New Jersey giving a right of action to enforce a lien against the building of a vessel was upheld. But it was upheld upon the ground that admiralty had no jurisdiction to

enforce a contract for the building of a vessel. If, as suggested above, admiralty should take cognizance of contracts for the building of vessels, a state statute in this regard would be likewise objectionable. In states where there are no statutes providing for liens against domestic vessels for repairs and supplies no action can be brought *in rem* against the vessel for such supplies unless by agreement, the theory of the admiralty law being that all supplies contracted for in the home port of the vessel are upon the credit of her owner and the only action one would have in admiralty would be *in personam.*

The State of Connecticut has statutes (Section 4160-4161), which provide in a general way for a lien for a claim of more than $20.00 for materials and services rendered in the construction or repair of any vessel, providing the person rendering such services and furnishing such materials shall, within ten days after rendering such services or furnishing such materials, file in the town clerk's office where the services were rendered or materials furnished, a certificate of lien on the vessel, giving name of vessel, if known, when he commenced to work or furnished materials, and the name of the owner or agent, if known to him, and leave a copy of such certificate with the owner or agent, if either is known to him to have a residence in this state. They also provide that this lien may be enforced like a mortgage on personal property. These statutes, it will be seen, make no distinction between foreign and domestic vessels and provide for a lien enforceable in the state court against a vessel itself. These statutes never having been before the courts, it is of course difficult to say just what interpretation would be placed upon them, but from the decisions of the United States Supreme Court it would seem reasonable that the statutes, if valid at all, would be so only in so far as they apply to the construction of vessels or repairs of domestic vessels enforced to admiralty, for if an attempt should be made to enforce them for the repairs on a foreign vessel they would be in direct violation of the *Roanoke, supra;* and if for the repairs of the domestic vessel in a *rem* proceeding in the state courts in direct violation of *Perry v. Haines, supra;* in violation of the decision in the *Roanoke* for the admiralty given an action for the repairs of a foreign vessel and no state statute can intrude upon its jurisdiction; in the violation of *Perry v. Haines,* for it would be an attempt to enforce a lien for repairs *in rem* in the state courts which proceeding is exclusively in the admiralty.

These Connecticut statutes in so far as they attempt to give

a lien against domestic vessels for supplies and repairs would probably be upheld if the enforcement of such liens should be prosecuted in the admiralty courts, for the only thing objectionable in these statutes, so far as it applies to repairs and supplies against domestic vessels in the forum which the statutes give for enforcing such liens.

The statutes so far as they apply to the construction of a vessel would probably be upheld, following the case of *Edwards v. Elliott, supra.*

But this, of course, is subject to what I have said above, that at the present time the Supreme Court seems to be inclined to enlarge the admiralty jurisdiction and might, should a case be brought before it, take jurisdiction of the construction of a vessel and if so the statutes at this point, so far as giving a *rem* proceeding is concerned, enforceable in the state courts, would be just as objectionable as they are in the other two.

An interesting case arose recently in the United States District Court for Connecticut and is a good illustration of how far the federal courts will go in applying the broad doctrines of admiralty to contracts for constructing vessels, although not technically within the jurisdiction of the admiralty courts. In this case a shipbuilder had contracts for building five four-masted schooners. When the schooners were partly completed, being in various stages of construction, one just launched and tied at the dock, three of the others in frame ready to ceil and the other the keel just laid, the shipbuilder becoming financially embarrassed, some of his creditors brought suit against him and attached all of these vessels as his property, putting a keeper in charge of the yard and one on board the schooner "George F. Scannell," which had been launched. The shipbuilder filed a petition in bankruptcy and his trustee took possession of these schooners and had them appraised as the property of the bankrupt. These schooners had all been built under the regular shipbuilding contracts, which provided among other things for the making of partial payments by the subscribing owners at certain stages of construction of the schooners and upon such payments being made, that the title to the schooners as they then were should vest in the subscribing owners. The payments on these various schooners had been made according to the terms of the contracts. The owners of these schooners filed petitions for the reclamation in bankruptcy which is in the nature of a libel for possession in admiralty. It was claimed in behalf of the trustee that by the state law of Connecticut

the possession of personal property on the part of the vendor after payment, is fraudulent as to creditors; but the court, following the doctrine laid down by Judge Butler in the *Poconoket* (67 F. R. 262, affirmed 70 F. R. 640, 17 C. C. A. 309), which was an action in admiralty for the possession of a vessel built upon a contract similar to the ones under which these schooners were being constructed, held that the title to these schooners under these contracts was in the subscribing owners and ordered them to return to such owners. (*In re* MacDonald, 138, F. R., 463.)

The comment on section 4160 of the statutes applying to liens in Connecticut is very misleading to practitioners, for while it starts off by saying that a state statute can give lien for materials and supplies furnished to a vessel in her home port, it closes by saying, "but the United States Supreme Court in 1858 refused to exercise its power for the future and repealed their former rule authorizing such libels." This of course, is not so; for in 1872 the Supreme Court amended its rule allowing material, men for supplies and repairs or other necessaries to proceed against the ship and freight *in rem,* or against the master or owner *in personam,* and the state statutes giving a lien for supplies and repairs furnished a domestic vessel in her home port, may enforce such lien in admiralty. This change in 1872 practically brought the law back to where it was in 1844.

I spoke above of liens by agreement on domestic vessels where the statutes of the state in the home port of the vessel make no provisions for a lien.

The presumption in admiralty is against a lien upon a domestic vessel for supplies, repairs, etc., the same as it is against a lien upon a foreign vessel for like contracts, when the owner is present. But where a state statute gives a lien such presumption is overcome and the lien is of equal rank with a foreign lien. (The *Amos D. Carver,* 35 F. R. 665.)

This class of liens by agreement has crept into the admiralty practice in the United States, that is, the giving of a lien on domestic vessels where there is no state statute providing for such lien, and a lien on foreign vessels when the owner is present. In neither of these cases is there any presumption for a lien. In fact the presumption is against a lien and the burden of proof is upon the person asserting such a lien to show that the minds of the parties met on a common understanding that a lien should be created. It is not enough for the one who furnishes the

supplies to have charged them to the vessel nor to say that he wouldn't have given the credit except upon the belief that he was to have a lien. Whether these liens created by agreement are of equal rank with liens that the admiralty presumes, is a question. But it is believed that at the present time such liens would be so held in the United States.

The rule is just the opposite where the law presumes a lien, that is, where the master obtains necessary supplies in a foreign port and in such a case the one disputing such a lien would have the burden in overcoming this presumption. (*The Surprise,* 129, F. R. C. C. A., 1st Circuit, 873.)

This presumption against a lien for supplies furnished to a vessel in a foreign port upon contract wth the owners is materially changed where it is shown that the owner is insolvent and unworthy of credit in such cases, instead of requiring the ones asserting such liens to assume the burden of proof, the law will imply that any personal credit of the owner instead of the vessel was improbable. (*The Newport,* 107, F. R. 744. Aff. so far as question of credit of vessel was concerned, 114 F. R. C. C. A., 2nd Circuit, 713.)

Another curious attempt at state court interference with the jurisdiction of the United States courts is the attempt to collect certain fees by harbor masters and port wardens in the nature of services rendered vessels. These fees frequently attempt to charge the vessels a certain amount per annum based upon their registered tonnage. A statute of this kind has only recently been before the United States District Court of New York in the case of *Way* (Harbor Master of the Port of Albany), *v. The New Jersey Steamboat Company* 133 F. R., 188. The statute provides: "That the master, owner or consignee of either steamboat or vessel, entering the Port of Albany, or loading or unloading, or making fast to any wharf therein, shall, within forty-eight hours thereafter, pay to the harbor master for his services the sum of one and one-half cents per ton per annum which shall be computed upon the registered tonnage of such steamboat or vessel." Upon the refusal of the steamboat company to pay such fees an action in admiralty was brought to recover the same. The Court, in rendering its decision, held that the statute was unconstitutional, as it attempted to impose a tonnage tax in violation of Article 1, Sec. 10, of the Constitution. It was attempted in behalf of the libellant to uphold this statute, inasmuch as it provided that a fee should be paid for services rendered by the harbor master and in this way distinguished it from the case of *The Inman Steamship Company*

v. Tinker (94 U. S., 238, 24 L. Ed. 118), which was a case deciding a statute in New York, similar to this, to be unconstitutional because of its attempting to collect tonnage tax. The statute as then prevailing did not say anything about any services rendered by the harbor master, but made it incumbent upon vessels to pay upon being docked, a certain tax which was held in this case to be in the nature of a tonnage tax. But the Court held that there was no material difference in the statutes and that the statute as at present enacted was just as objectionable as the old statute and dismissed the libel.

Section 4765 of the general statutes of Connecticut, which is as follows: "The person in charge of each vessel of a draft of more than six feet and of over fifty tons burden, carrying cargoes to the city of Hartford from any port or place beyond the mouth of the Connecticut river, and of each steamer engaged in towing on said river, shall report to the port warden of the city of Hartford within twenty-four hours after each arrival at said city, stating the name and registered tonnage of such vessel or steamer, and shall pay to him for each vessel carrying cargoes, and for each steamer engaged in towing, a toll of two cents a ton upon its registered tonnage, except that where the actual weight of the cargo can be determined by its bills of lading, such toll shall be imposed on said actual tonnage, at the rate of one cent a ton. The Hartford and New York Transportation Company shall, on the first day of June in each year, pay to said port warden one thousand dollars, in lieu of all tolls imposed by this section. The person in charge of any such vessel or steamer, and the owner, shall be jointly and severally liable for such toll; and if the person in charge shall neglect so to report and to pay toll, after demand by said port warden, he and the owner of such vessel or steamer shall be jointly and severally liable to pay double the amount of such toll; and the city court of said city shall have jurisdiction of all suits instituted for the recovery thereof;" seems to be similar to the New York statute in the form in which it was when it was interpreted in the case of the *Inman Steamship Company v. Tinker, supra,* and should it come before the federal courts it would undoubtedly be declared unconstitutional.

This Connecticut statute, while similar to the New York statute, has one other objectionable feature, inasmuch as it also attempts to tax vessels coming from other states, as it will be noticed that it provides for this tonnage tax on vessels carrying

cargoes to the city of Hartford from any port or place beyond the mouth of the Connecticut river.

It must be apparent from this that no state statutes, even though they may be upheld by the court of their respective states, can in any way interfere or abrogate the principles of maritime law.

A very interesting case on similar question is that of *Workman v. Mayor of New York et al*, 179 U. S., 553, 45 L. Ed. 314, and points out clearly that admiralty will not permit any interference with its exclusive jurisdiction. In this case a fire boat belonging to the city of New York ran into and damaged a barkentine tied up to a wharf. There was a fire raging at the time and the fire boat was hurrying to assist in putting out the fire. This case was brought by the owners of the barkentine in the admiralty court against the mayor and other officials of New York, which action was upheld by the district court. The circuit court of appeals reversed the district court and the case was taken by a writ of *certiorari* to the Supreme Court of the United States. The Supreme Court in an opinion by Mr. Justice White, held that the maritime law and not the local law governed in determining the liability of the city for injury to a vessel by one of its fire boats. This, of course, is entirely contrary to the local law which absolves a municipality for injury done in performing a public service for the general welfare of the inhabitants of a community. The Court did not decide whether an action could be maintained against the fire boat *in rem* or whether one would have to proceed in like cases *in personam*, but seems to admit that an action *in rem* could be brought. The reason for this decision must be obvious, for if foreign vessels coming into our ports should be damaged by one class of vessels with no right of action and by another class of vessels where there would be no action, the general maritime law of the world would be so changed and upset that it would not answer the purpose for which it has been developed through a long period of years.

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